



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

June 28, 1995

Ms. Jan Greenberg  
Supervising Attorney  
Office of General Counsel  
Texas Department of Health  
1100 West 49th Street  
Austin, Texas 78756-3199

OR95-527

Dear Ms. Greenberg:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26715.

You explain that the Department of Health has a contract with Ogden Government Services to implement an "integrated client encounter system" (ICES) for the department. This is a major information resources<sup>1</sup> project with development costs anticipated to be in excess of \$1,000,000. A state agency may not expend appropriated funds for a major information resources project unless the project has been approved by the Department of Information Resources. Acts 1993, 73d Leg., ch. 906, § 1.22, at 3823.<sup>2</sup> The Department of Information Resources "shall develop rules or guidelines for its review of major information resources projects." *Id.*; see also General Appropriations Act, Acts 1993,

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<sup>1</sup>The Information Resources Management Act, Gov't Code ch. 2054, defines "[i]nformation resources" as "the procedures, equipment, and software that are designed, built, operated, and maintained to collect, record, process, store, retrieve, display, and transmit information, and associated personnel including consultants and contractors." Gov't Code § 2054.003(6).

<sup>2</sup>The Information Management Act was formerly codified as V.T.C.S. article 4413(32j). The seventy-third session of the legislature repealed article 4413(32j) and recodified the Act as chapter 2054 of the Government Code. The same session of the legislature adopted several amendments to article 4413(32j). See, e.g., Acts 1993, 73d Leg., ch. 906, § 1.22, at 3823. The repeal of a statute by a code does not affect an amendment of the statute by the same legislature which enacted the code, and the amendment is preserved and given effect as part of the code provision. Gov't Code § 311.031(c).

73d Leg., ch. 1051, art. V, § 133 at 5390 (appropriation authority for major resource projects contingent on preparation of independent risk analysis among other conditions). The Department of Health has contracted with a consultant to monitor the ICES project and prepare an independent risk analysis. The consultant has submitted two monitoring reports to the department, and these have been requested pursuant to the Open Records Act.

You claim that the requested reports are excepted from disclosure by section 552.103 of the Government Code, which applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You claim that there is a concrete possibility of litigation between Ogden Government Services and the Department of Health, and you submit E-mail correspondence between a representative of Ogden and the Department of Health, which demonstrates the likelihood of litigation between the two parties. Moreover, the assistant attorney general representing the Department of Health has informed us that the possibility of litigation still exists. The prospect of litigation has been sufficiently established for section 552.103 to be invoked. We have reviewed the reports and conclude that they are related to the prospective litigation between the state and Ogden. Accordingly, you may withhold the reports from disclosure pursuant to section 552.103 until the records are released in discovery or otherwise to the opposing party or until the prospective litigation has been resolved, whichever event occurs earlier. In view of our conclusion based on section 552.103 of the Government Code, we need not address your other arguments.<sup>3</sup>

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<sup>3</sup>You inform us that the requester is Ogden, whose performance is a subject of the requested reports. The independent contractor that prepared the reports has asked Ogden to indemnify it from any and all claims, including "violation of intellectual property rights, confidentiality of information, discrimination, . . . violation of trade secrets, defamation, libel, slander, . . . lost fees, wages, or other remuneration," as a condition of access to the reports. Ogden has refused to grant the indemnity, and you asked us to determine whether Ogden's refusal of indemnification makes the report confidential. We need not address this argument at this time. *But see* Attorney General Opinion MW-307 (1981) at 1 (custodian of records may not inquire into requestor's reasons for requesting information).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Open Government Section

SLG/MAR/rho

Ref.: ID# 26715

Enclosures: Submitted documents

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